

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In re Request of)	
)	
AT&T Inc., BellSouth Corporation, Comcast)	
Corporation, NextWave Broadband Inc.,)	
NTELOS, Inc., Sprint Nextel Corporation,)	
Verizon Laboratories Inc., and WaveTel NC)	
License Corporation)	
)	
For Limited Extension of Deadline for)	WT Docket No 06-102
Establishing Compliance With Section 27.14)	
Substantial Service Requirement)	
)	
)	
WCS Wireless License Subsidiary, LLC)	
)	
Request for a Waiver of the Section 27.714(a))	
Build-Out Requirements)	

**STATEMENT IN SUPPORT OF CONSOLIDATED
REQUEST FOR LIMITED EXTENSION OF BUILD OUT DEADLINE
AND REQUEST FOR WAIVER OF SECTION 27.714(A)**

WCS Wireless, LLC, and its subsidiary, WCS Wireless License Subsidiary, LLC (collectively, "WCS Wireless"), through counsel and pursuant to 47 C.F.R. §§ 1.3 and 1.925(b), and the Commission's Public Notice of May 11, 2006 (DA 06-1009), hereby (a) submits its comments for support of the first above-captioned request¹; and (b) submits its companion ("Request for Waiver") of the Commission's construction requirements for Wireless

¹ WCS Wireless has reviewed the "Consolidated Request for Limited Extension of Deadline for Establishing WCS Compliance With Section 27.4 Substantial Service Requirement," (the "Coalition Request") and is fully supportive of that request, for the reasons set forth herein.

Communications Services (“WCS”) licensees set forth in 47 C.F.R. § 27.14(a), and a three year extension of the time period within which to so build.²

The facts and circumstances surrounding the Coalition Request and the instant WCS Wireless request are virtually identical. While the arguments presented herein are submitted to support the WCS Waiver Request, they are also filed in support of the Coalition Request.³

For the reasons set forth below, WCS Wireless submits that grant of the requested relief would serve the public interest, be consistent with established Commission policy and precedent and should be granted promptly.⁴

I. BACKGROUND

A. WCS Generally

Since its inception, the WCS licensees have been subject to complications that other licensees have not had to face. Chief among these is the special, but not defined clearly, protection that WCS licensees must accord to (and receive from) Satellite Digital Audio Radio Service (“SDARS”) terrestrial repeaters that operate in spectrum immediately adjacent to WCS, and the absence of any rules governing SDARS operations.⁵

² The stations for which a waiver is being sought are set forth in Exhibit A hereto.

³ WCS Wireless has requested, and received from the Coalition, authority to join in the Coalition Request petitions. Accordingly, WCS Wireless urges the Commission to treat WCS Wireless Request for Waiver as being so joined. Regardless of whether the two petitions are viewed as being formally joined they present essentially the same facts and law and must be treated in the same way – *Melody Music VFCC*, 345 F.2d 730, 732 (D.C. Cir. 1965)

⁴ This difficult situation (i.e., one where a service was established and licensed prior to the development of rules governing an adjacent service whose presence impacts substantially on virtually all aspects of the first service) was thrust upon the Commission as much as it was upon WCS licensees by virtue of unusual and absolute congressional mandates. See, Omnibus Consolidated Appropriation Act, 1997 P.L. 104-208, 110 stat 3009 (1996) (the “Appropriations Act”). The Appropriations Act took the unusual step of mandating that WCS spectrum be auctioned by a given date (April 15, 1997) and granted the Commission special permission to use expedited

The Commission fully appreciated this unusual confluence of events when it first promulgated WCS rules. See, e.g. Report and Order in GN Docket No. 96-228, 12 FCC Rcd 10785 (1997) (“*Report & Order*”), where the Commission discussed generally the complications associated with the unsettled SDARS situation. See also the *Report and Order*, at 10843, where the Commission addressed the impact that the SDARS and other matters had on build-out requirements. There, the Commission stated that, “considering the unique circumstances in which WCS licenses are being awarded and the strict technical requirements necessary to prevent interference, we will adopt very flexible build-out requirements.” *Id.* The Commission also recognized that other aspects of the Commission’s WCS licensing process provided effective safeguards and performance standards for WCS, thus reducing the need for build-out requirements. *Id.*, at 10844. The Commission also expressly reserved the right to revisit its build-out requirements if the evolving situation so warranted. *Id.*, at 10845.

B. WCS Wireless Actions to Date

WCS Wireless is licensed in three of the six WCS C and D block markets. It covers nearly 40% of the total US population and nine of the top ten metropolitan markets. WCS Wireless holds, by far, the largest share of C and D block licenses. WCS Wireless acquired its licenses relatively recently, in March 2004. Since then, it has proceeded methodically to implement a datacasting business plan. In fact, WCS Wireless has been at the forefront of WCS licensees that have strived to develop the spectrum. Those efforts have been stymied by, among

administrative procedures, including bypassing established Federal Register publication waiting periods and making inapplicable nominal regulatory flexibility and information collection requirements.

other things, the lack of clarity in the rules and the associated unavailability of equipment, both discussed herein.³

II. DISCUSSION

A. The Commission's Waiver Standard

A waiver of the Commission's rules applicable to wireless services is appropriate whenever a party demonstrates either (1) that the underlying purpose of the rule would not be served or would be frustrated by its application to the instant case, and that grant of a waiver would be in the public interest (47 C.F.R. § 1.925(b)(3)(i)), or (2) in view of unique or unusual factual circumstances in the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. (47 C.F.R. § 1.925(b)(3).)

The Commission has authority to waive its rules whenever there is "good cause" to do so. 47 C.F.R. §§ 1.3; 1.925. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F. 2d 1153, 1159 (D.C. Cir. 1969) ("WAIT Radio"). As further explained in WAIT Radio, the Commission is charged with administration of its responsibilities consistent with the "public interest." That an agency may discharge its responsibilities by promulgating rules of general applicability which, in an overall context, establish the "public interest" for a broad range

³ In order to overcome those obstacles WCS Wireless also entered into an agreement to merge with an SDARS licensee. See File No. 0002240823. That application has been challenged due to, among other things, lack of clarity regarding interference risks and governing rules, all involving interference to and from SDARS and WCS licensees. Given the more than 10 months that have passed since the application was filed, and the uncertainty regarding when and how the Commission will respond to the application, the merger strategy cannot now be considered a solution to the problems of uncertainty of rules and unavailability of equipment.

of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases. In fact, the Commission's right to waive its rules is not unlike an obligation in that it is a sine quo non-to its ability to promulgate otherwise rigid rules of general applicability. Reviewing courts have recognized it to be the necessary "safety valve" that makes the system work. See, WAIT Radio at 1157, 1159.

B. The Circumstances Surrounding WCS Licensing are Unique and Unusual

As far back as the establishment of the service, the Commission has properly recognized the service to be "unique" insofar as build-out requirements are concerned. 12 FCC Rcd at 1083. Nothing has changed over the years. The single most complicating issue continues to be the absence of any certainty regarding the neighboring SDARS allocation. The proceeding that is to add clarity there has now been ongoing for several years, without any permanent rules ever being promulgated. Moreover, there is still no reasonably definitive timeframe within which SDARS rules are anticipated to be promulgated. Thus, the 47 C.F.R. § 1.925(b)(3)(i) waiver predicate is here met.

Without belaboring the obvious, brief discussion of why formal SDARS rules are so critical to WCS build efforts would appear to be instructive. Unless and until SDARS rules are promulgated, the protection that WCS licensees must provide to SDARS licensees will remain unclear. Similarly, the protections to which WCS licensees are (and are not) entitled also remains unsettled. Without reasonably delineated information on the above two issues, it becomes impractical for vendors to design, price and offer equipment in the WCS bands. It also becomes impractical for WCS licensees to realistically assess what services can be efficiently offered to the public in a manner that will cause them to be competitive with offerings from other bands. In sum, until SDARS rules are promulgated, WCS licensees are in an impossible

situation with respect to their product offerings. As such, any build-out would be inherently and prohibitively risky, or would be designed solely to meet Commission build-out requirements rather than to provide commercial service.⁶ Neither of those build out scenarios would serve the public interest.

The above situation is, as the Commission itself has already recognized, unique. Moreover, it is the unique situation that causes it to be impractical to meet the Section 27.714 build-out requirement. As such, it provides fully the factual predicate to justify the waiver here sought.

C. The Underlying Purpose of the Rule Would Be Frustrated by Its Application Here, and Grant of a Waiver Would Serve the Public Interest.

The instant request also complies fully with the Section 1.925(b)(3)(i) waiver standard in that the underlying purpose of the rule would be frustrated by its application here, and grant of the subject waiver would serve the public interest.

The basic purpose of build-out rules is to comply with the Congressional directive to adopt safeguards “to protect the public interest in the use of the spectrum” and performance requirements “to ensure prompt delivery of service to rural areas, to prevent stock piling of spectrum by licensees or permittees, and to promote investment in and rapid development of new technologies and services.” 47 U.S.C. 309(i)(4)(B). The Commission recognized this when it established the WCS. 12 FCC Rcd at 10841. At that time, the Commission openly recognized that a genuine question existed as to whether any build out requirements would further compliance with those Congressional directives. *Id.* at 10843. In fact, the Commission went so

⁶ The Commission has previously recognized the “undeveloped nature of the equipment for use in this band...” 12 FCC Rcd at 10843, and nothing has transpired in the interim to change that situation.

far as to appreciate that, in the case of the WCS, “strict construction requirements might have the effect of discouraging participation in the provision of services over the WCS spectrum;” that WCS licensees who seek to “efficiently conduct certain operations over WCS spectrum [may have to] await further technological developments to do so;” and that “[a]dopting strict requirements here could effectively preclude efficient use of the spectrum.” *Id.* Each of those Commission recognitions remain as valid today as when the WCS was established.

Strict application of the build-out rule would also be unduly burdensome here. For the reasons discussed above, efforts to comply with the build-out requirements would serve no other purpose. Most certainly, given the wholesale lack of certainty discussed above, such efforts would not, in and of themselves, further the public interest or result in any commercial offerings. Instead, they would effectively cause resources to be squandered inefficiently and as such would actually inure to the public detriment. As such, the alternative standard for a waiver of the Commission’s rules has also been met in the context of the WCS.

D. Considerable Precedent Supports Grant of the Instant Request.

Over the years, the Commission has established a considerable body of case law governing requests for waivers or extensions of build-out requirements.⁷ At the core of those collective decisions is the principle that where external factors that are not within licensee’s control cause it to be not practical to comply with build-out requirements, they should be

⁷ WCS Wireless appreciates that, at one level, each waiver request is to be entertained on an individual case-by-case basis. Yet, WCS also understands that in reaching such decisions the Commission must be guided by its prior actions involving similar situations and that the Administration Procedure Act and the Telecommunications Act both obligate the Commission to treat similar requests in the same manner absent differences in situation that are “relevant to the purposes of the Communication Act.” *Melody Music, Supra*, at 734. Here, there is considerable precedent that includes no such differences and demonstrates that the subject waiver should be granted.

waived.⁸ Unavailability of equipment is one factor that the Commission has repeatedly recognized as being out of a licensee's control and as thus supporting grant of a waiver. The instances where the Commission has taken such action involve almost every wireless service and are virtually too many to chronicle fully, but a non-exhaustive listing includes the following:

- In Re Request of Warren C. Havins – 220 MHz licensees' request for an extension of construction granted due to unavailability of equipment, noting that "we do not believe it is reasonable to fault licensees who obtained licenses and then faced an unexpected loss of equipment." (19 FCC Rcd 12994, 13001 (WTB 2004)).
- American Wireless, LLC – Broadband PCS licensee's request for waiver and extension of build-out deadline granted due to unavailability of equipment delivery and other factors beyond its control. (15 FCC Rcd 11025 (WTB 2000)).
- FCI900 Inc. – All 900 MHz SMR licensees granted an extension of time to construct due to the fact that "equipment will not be commercially available in sufficient quantities in time to meet the five year construction deadline." (16 FCC Rcd 11072, 11077 (WTB 2001)).

Similarly, where (as is here unquestionably the case) there was fundamental uncertainty with respect to governing rules, extensions of construction deadlines have also been granted:

See, e.g.:

- Request by IVDS Lottery Winners – the Commission granted an extension of time for multiple IVDS licensees and noted that "pending of this IVDS rulemaking is inextricably tied to these licensees' construction requirements and the mechanisms used to satisfy those benchmarks." (12 FCC Rcd 3181, 3183 (WTB 1997)).
- Request by IVDS Auction Winners – the Commission granted a further extension of construction deadlines, noting that "our approach here is consistent with prior Commission actions suspending a deadline while relevant policy is subject to pending rulemaking proceedings." (13 FCC Rcd 756, 758 (WTB 1998)).
- Request by MMDS BTA Licensees – Extension of time to construct, noting that it would be in the public interest to grant an extension of time to build where the alternative would

⁸ See cases discussed below. See also, 47 C.F.R. § 1.946(e)(i), providing that extension of build-out deadlines are appropriate where compliance is not practical due to causes beyond its (the licensee's) control."

be for licensees to construct systems “solely to satisfy the present five-year construction deadline.” (Extension of Five Year Build Period, 16 FCC Rcd 12593, 12596 (MMB 2001)).

- Request of BRS Licensees – Extension of performance deadline granted where the Commission observed that “In light of the breadth of the proposals set forth in this *NPRM & MO&O*, and our re-evaluation of performance standards for the 2500 -2690 MHz band, we believe that suspending the current August 16, 2003 construction deadline for BTA authorization holders is in the public interest. While we are normally reluctant to suspend a build-out requirement, a suspension of this construction deadline will allow the Commission to evaluate the performance requirements and service rules for this band. This approach is consistent with prior Commission actions suspending a deadline while relevant policy is subject to the pending rulemaking proceedings.” (In Re Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules, 18 FCC Rcd 6722, 6805 (2003)).

The above amply demonstrates that the Commission has repeatedly, and properly, extended build-out deadlines when presented with circumstances as are here present, and Melody Music tells us that similar action is here appropriate.

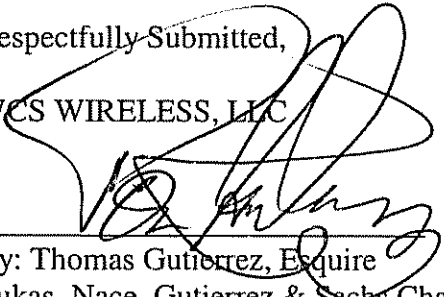
III. Conclusion

In sum, unique and unusual circumstances unquestionably permeate through the WCS and such circumstances detract from the ability of WCS Wireless and other members of the Coalition, to comply with the Section 27.714(a) build-out requirements. An independent basis for waiver exists due to the fact that enforcement of the rule would frustrate its overriding purpose of having the spectrum be put to good use. Furthermore, the reasons that compliance is impractical are out of control of the WCS Wireless and other WCS licensees. As such, the waiver standard set forth in Section 1.3, 1.925(b)(i) and (ii) and 1.946 have each been met and the requested waiver should be granted.

The relief granted should be a three years extension of time to comply with that period to commence upon the date that the Commission adopts meaningful SDARS rules.

Respectfully Submitted,

WCS WIRELESS, LLC



By: Thomas Gutierrez, Esquire
Lukas, Nace, Gutierrez & Sachs Chartered
It's Attorney

May 12, 2006

WCS Spectrum Licenses

Call Sign	Market No.	Channel Block	Market Name
KNLB207	MEA030	A	St. Louis, MO
KNLB208	MEA003	B	Buffalo, NY
KNLB295	MEA045	A	Portland, OR
KNLB296	MEA046	A	Seattle, WA
KNLB297	REA001	D	Northeast
KNLB298	REA005	C	Central
KNLB299	REA005	D	Central
KNLB300	REA006	C	West
KNLB301	REA006	D	West
KNLB302	MEA015	A	Cleveland, OH
KNLB303	MEA015	B	Cleveland, OH
KNLB304	MEA016	A	Detroit, MI
KNLB305	MEA018	A	Chicago, IL
KNLB306	MEA029	A	Kansas City, MO
KNLB307	MEA033	A	Denver, CO
KNLB308	MEA048	B	Hawaii